EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms N Chung	**v**	**Whisky 1901 Ltd**

Heard at: London Central (in chambers)

On: 8 December 2024

Before: Employment Judge **P Klimov**

JUDGMENT

1. The claimant's application for a costs order dated 17 October 2024 succeeds in part.

2. The respondent is ordered to pay to the claimant **£6,230.70** in respect of the claimant's costs.

REASONS

Introduction

1. On 18 September 2024, the Tribunal issued a judgment upholding most of the claimant's complaints in the claim and ordering the respondent to pay compensation to the claimant in the total amount of £51,776.67 ("**the Judgment**"). The Judgment was sent to the parties on 24 September 2024.

2. On 17 October 2024, the claimant submitted an application for a costs order ("**the Application**"), pursuant to Rule 76(1)(a), 76(1)(b) and 76(2) of the Employment Tribunals Rules of Procedure 2013 ("**the ET Rules**").

3. On 24 October 2024, I issued the following orders:

"It is ordered that:

1. If the respondent wishes to make any representations on the costs order application, it must send those to the Tribunal and the claimant by 31 October 2024,

2. By 31 October 2024, both parties must write to the Tribunal, giving their views as to whether the costs order application should be decided on paper or at a costs hearing, and whether it should be decided by Employment Judge Klimov (sitting alone) or with the Members. The parties must give reasons.

Further directions will be issued following receipt of the parties' representations, as appropriate."

4. On 28 October 2024, the respondent's solicitors wrote to the Tribunal asking for an extension of time until 14 November 2024 to submit representations on the Application, because they were having difficulties obtaining information from the previous respondent's advisers, Croner.

5. On 30 October 2024, the claimant's solicitors wrote to the Tribunal, asking the Application to be determined on the papers by the full Tribunal.

6. On 4 November 2024, I issued the following order:

"The respondent's application dated 28 October 2024 for an extension of time to provide representations on the claimant's costs application has been passed to me today, 4 November 2024. Although, the date for compliance had passed before I was able to deal with the respondent's application, considering the representations made in the respondent's application I find that it will be in the interests of justice to grant an extension until 14 November 2024, being 28 days from the date of the claimant's costs application.''

7. On 4 November 2024, the respondent's solicitors applied to stay the determination of the Application, pending an appeal of the Judgment to the EAT.

8. On 5 November 2024, I refused the stay application. Together with refusing the stay application, I gave the following order:

"If the respondent wishes to submit any representations on the claimant's costs application, it must send them to the Tribunal and the claimant by no later than 14 November 2024, failing which the costs applications will be determined on the papers as being unopposed by the respondent."

9. The respondent did not submit any representations in opposition to the Application.

10. Although the claimant's solicitors indicated their preference to have the Application decided by the full Tribunal that heard the claim, having considered the content of the Application (the large part of which relates to the respondent's conduct before the hearing and the prospect of success of part of the respondent's defence) against the factors set out in the Presidential Guidance on Panel Composition, I decided that the members would not add significant value to the fair determination of the Application, and that it would be in the interests of justice and in accordance with the overriding objective for the Application to be considered by me, sitting alone.

The Application

11. The claimant submits that the Application should be granted for the following reasons:

    a. The respondent conducted the proceedings unreasonably, vexatiously, and disruptively by failing to collaborate with the claimant, resulting in a

significant increase in costs for the claimant.

b. The respondent persistently failed to engage and comply with the Tribunal case management orders to:
    i. properly particularise its defence related to the claimant's suspension and imposition of a 12-month warning in its Amended Response;
    ii. disclose all relevant documents;
    iii. prepare and agree with the claimant a hearing bundle;
    iv. exchange witness statements.

c. The respondent made a very late application to postpone the final hearing.

d. The respondent's conduct during the hearing was disruptive by the respondent and its counsel:
    i. making various applications, which were served to obstruct and elongate the proceedings;
    ii. attempting to introduce further previously undisclosed documents by way of an exhibit to Mr Sparkes' witness statement;
    iii. criticising the claimant for late disclosure of the documents even though the respondent had had them for some time;
    iv. seeking to introduce further documentary evidence (of 510 pages) on the third day of the hearing, after the claimant had finished giving her evidence;
    v. redacting the documents and making a misconceived claim of legal professional privilege;
    vi. applying to recall Mr Sparkes to be re-examined on the documents, which had not been admitted in evidence;
    vii. on the fourth day of the hearing making a further application to admit the entire 510-page supplemental bundle, despite the Tribunal had already refused to admit these documents in evidence;
    viii. "appealing" there and then the Tribunal's decision to refuse the admission of the documents;
    ix. when the Tribunal refused to hear "the appeal", making an application for the Tribunal to recuse itself for apparent bias.

e. The respondent was put on notice several times of a costs order application potentially being made.

f. The respondent failed to engage in settlement discussions in good faith.

g. Following the sending of the Judgment contacting the claimant making unfounded allegations that the claimant was in contempt of court and had committed a criminal offence by perjuring herself, stating that if the claimant withdrew her claim and agreed for the Judgment to be set aside, the respondent would not pursue an appeal or a finding of contempt of court further.

h. Part of the respondent's response had no reasonable prospect of success, in relation to the length of the claimant's suspension and imposition of a 12-months warning.

12. The claimant seeks an order for the respondent "*to pay the whole or a specified part of [her] costs, with the precise amount to be assessed by the County Court, pursuant to Tribunal Rule 78(1)(b). In the alternative, the Claimant seeks an*

order under Rule 78(1)(a), that the Respondent pay a sum of up to £20,000, being the maximum amount which may be awarded".

13. The claimant submitted a statement of costs in the total amount of £35,522.80 (incl. VAT), and two fee notes from counsel £3,000 (incl. VAT) for work on the claimant's further and better particulars, and for £6,333.33 (incl. VAT) for the trial.

14. As noted above, the respondent did not submit any representations in opposition of the Application, despite being granted an extension of time, and despite being told that if it had not submitted its representations by 14 November 2024, the Application would be determined on the papers as being unopposed.

The Law

15. Rule 76 of the ET Rules states:

"*(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
(b) any claim or response had no reasonable prospect of success;
[…]
(2) *A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."*

16. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.*"

17. The following key principles relevant to the Tribunal's powers to make costs orders can be derived from the case law.

18. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the civil courts - (*Yerrakalva v Barnsley Metropolitan Borough Council* 2012 ICR 420, CA).

19. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered - (*Haydar v Pennine Acute NHS Trust* UKEAT/0141/17).

20. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in

person should not be judged by the standards of a professional representative - (*AQ Ltd v Holden* [2012] IRLR 648).

21. Where the paying party has taken legal advice, the Tribunal should proceed on the assumption that the party has been properly advised - (*Brooks v Nottingham University Hospitals NHS Trust* UKEAT/0246/18 EAT).

22. The term "*vexation*" shall have the meaning given by Lord Bingham LCJ in *AG v Barker* [2000] 1 FLR 759: "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" - (*Scott v Russell* 2013 EWCA Civ 1432, CA).

23. "*Unreasonable*" has its ordinary English meaning and is not to be interpreted as if it means something similar to "*vexatious*" - (*Dyer v Secretary of State for Employment* EAT 183/83).

24. In determining whether to make a costs order for unreasonable conduct, the tribunal should consider the "*nature, gravity and effect*" of the paying party's unreasonable conduct — (*McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA), however the correct approach is not to consider "*nature*", "*gravity*" and "*effect*" separately, but to look at the whole picture.

25. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (*Yerrakalva v Barnley MBC* [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach:

> "*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

26. Whether a claim or a defence had reasonable prospects of success is an objective test. It is irrelevant that the party genuinely thought that their case had reasonable prospects of success – (*Scott v. Inland Revenue Commissioners* [2004] ICR 1410 CA, at [46]).

27. In considering whether a claim or a defence had no reasonable prospects of success, the tribunal is not to look at the entire claim, but each individual cause

of action – (*Opalkova v Acquire Care Ltd* EAT/0056/21 at [17]).

28. Whether a claim or a defence had no reasonable prospects of success from the outset is to be judged by reference to the information that was known or was reasonably available at the start of the proceedings – (*Radia v. Jefferies International Ltd* EAT/0007/18, at [65]). The tribunal should be wary of being wise with hindsight.

29. In *Cartiers Superfoods Ltd v Laws* [1978] IRLR 315, the EAT said that the the Tribunal must: *"... look and see what the party in question knew or ought to have known if he had gone about the matter sensibly*."

30. But *Radia* is not authority for the proposition that, as long as a claim had had reasonable prospects of success at the outset, pursuing it after it has become clear that it does not have reasonable prospects of success will not engage the costs jurisdiction.

31. *Radia*, at [62], is also authority for the proposition that there may be an overlap between unreasonable conduct under rule 76(1)(a) and no reasonable prospects of success under rule 76(1)(b).

32. The failure by the receiving party to apply for a strike out or issue a costs warning on the ground that the paying party's case has no reasonable prospect of success may be a factor for the Tribunal to take into account when exercising its discretion – (*AQ Ltd v Holden* [2012] IRLR 648 EAT). However, such failure to apply for a strike out or to issue a costs warning is not sufficient as the evidence "*that those claims had in fact any reasonable prospect of success.*" – (*Vaughan v Lewisham LBC* [2013] IRLR 713 EAT, at [14]).

33. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably – (*Kopel v Safeway Stores plc* [2003] IRLR 753, EAT, at [16-18]).

34. Costs awards are compensatory, not punitive – (*Lodwick v Southwark London Borough Council* [2004] ICR 884 CA).

35. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party's ability to pay. In *Jilley v Birmingham and Solihull Mental Health NHS Trust* (21 November 2007) HH Judge David Richardson said:

> *"[44] Rule 41(2) gives to the Tribunal a discretion whether to take into account the paying party's ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy written reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential."*

36. The Presidential Guidance on General Case Management state:

> *"17. Broadly speaking, costs orders are for the amount of legal or professional fees and related*

expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party."

18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows:

18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);

[…]

21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings."

The Facts

37. On 6 November 2023, the respondent was ordered by EJ Emery to disclose all relevant documents by 5 February 2024. The EJ Emery's order stated:

"12. Documents includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it."

38. On 6 February 2024, the claimant's solicitors wrote to the respondent's representatives, Croner, chasing the disclosure. The respondent did not reply, save for an automatic out of office message from the case handler, Ms Sodhi.

39. On 20 February 2024, the claimant's solicitors submitted a strike out application for the respondent's failure to comply with the Tribunal's orders. The application prompted a reply from the respondent's representative, Ms Sodhi, explaining that she had been off work until 1 February 2024 due to a car accident. The delay between 1st and 20th of February was explained by Ms Sodhi as her "*catching up with work and hearings*". In the same email Ms Sodhi stated that "*[t]he disclosure [was] now ready and complete…"*.

40. On 21 March 2024, the claimant's solicitors wrote to the respondent's representatives seeking disclosure of specific documents omitted from the respondent's disclosure. The first costs warning was issued.

41. No substantive response was provided by the respondent. An automatic out of office message was received from Ms Sodhi's email, without specifying the return date or giving contact details of a person who was handling the matter in her absence.

42. On 24 April 2024, the claimant's solicitors wrote again to the respondent's representatives, pointing out that the respondent was still in default of its disclosure obligations, complaining of the general lack of cooperation and engagement with the case, and highlighting the fact that the respondent was now in default of the Tribunal's order to prepare and agree with the claimant a hearing bundle. Another costs warning was included in that email.

43. On 13 May 2024, having received no reply from the respondent, the claimant's solicitors sent another email, chasing a reply to their earlier communications and pointing out that the parties were ordered to exchange witness statements by 17 May 2024, which in light of the respondent's continued failure to disclose all relevant documents and prepare a hearing bundle was no longer feasible. They offered to extend the deadline to 31 May 2024. In the same email, the claimant's solicitors again raised the issue of the respondent not cooperating with the claimant in preparing the case for the final hearing, making a specific reference to the overriding objective. A third costs warning was given.

44. Later that day, the respondent's representatives replied, stating that the previous case handler, Ms Sodhi, had left their business, and the delay was "*due to the difficulties experienced due to Ms Sodhi's departure…*". They apologies for the delay and stated that the case was "*treated as an absolute priority to ensure requisite resources are put to it in the soonest this week.*" The respondent's new representative promised to contact the claimant's solicitors "*in due course this week*".

45. On 16 May 2024, the respondent's representative wrote to the claimant's solicitors stating that they were unable to find the claimant's disclosure, asking it to be re-sent.

46. On 20 May 2024, the claimant's solicitors applied to the Tribunal for various orders to address the respondent's continuing default. They also wrote to the respondent's representatives, pointing out that the respondent was still in default and had failed to respond to the claimant's previous requests for further disclosure.

47. On 13 June 2024, having received no substantive response from the respondent, the claimant's solicitors wrote yet again, pointing out that, despite stating on 16 May that the case would be dealt with "*as an immediate priority*" the respondent still had not properly addressed the outstanding matters. A fourth costs warning was given.

48. The respondent's representatives replied on the same day with "*an interim response*", objecting to the costs warning, providing a draft bundle, and stating that they were taking instructions regarding additional documents requested by the claimant back in March 2024. They also indicated that they would be applying to the Tribunal to extend the deadline for exchanging witness statements.

49. On 24 June 2024, the claimant's solicitors wrote to the respondent's representatives, pointing out that the respondent remained in default of the Tribunal's orders and no substantive response had been provided on the outstanding matters. Comments on the draft bundle were provided.

50. On 4 September 2024, the respondents' new representatives, Adam Benedict, applied to have the hearing adjourned because the respondent would not be ready for the hearing. They unjustifiably blamed the claimant for the delay. However, they also admitted:

> *"Whilst on behalf of the Respondent we have to accept that there has been a failure to attend adequately to the preparation of this case, we would ask the Tribunal to note that the individual filed handler for our client's previous representatives, Croner, was seriously ill from late June until recently and as such was in no position to bring the Respondent's case to a position of trial readiness, nor was she able to respond to the Claimant's disclosure request. We do not believe it would be reasonable, fair or in the interests of justice for the Respondent to be penalised for this as it was plainly outside of their control."*

51. The claimant objected to the postponement application. The application was refused by EJ Baty. In refusing the application, EJ Baty said:

> *"The respondent's new representatives may only just have been instructed but the 5-day hearing has been listed for 10 months and the application to postpone was made just over a week before the commencement of that hearing. It was therefore made it a very late stage.*
>
> *The claimant objects to a postponement.*
>
> *It appears from that objection that the claimant has complied with the tribunal orders for preparation for the hearing and is ready for the hearing; and it is only the respondent which has failed to comply and is not therefore ready for the hearing. It appears that there is a bundle prepared for the hearing and that the claimant has served her witness statement. It is, therefore, practically possible for the hearing to proceed.*
>
> *Whilst it is unfortunate if the respondent's previous representative at Croner has been unwell since June 2024, Croner is a large organisation and it is not the claimant's fault if it did not have sufficient controls in place for someone else to take over from the unfortunate member of staff who was ill."*

52. EJ Baty ordered that the respondent

> "*do what it is able in the coming days to be able best to prepare for the hearing. If it wishes to serve witness statements, it must do so no later than Monday, 9 September 2024 (not limited to business hours that day)".*

53. Witness statements were exchanged on 9 September 2024 at 10.26pm, two days before the start of the hearing. The respondent tried to introduce further documents by way of an exhibit to Mr Sparkes' witness statement (30 pages). That was refused by the Tribunal on the first day of the hearing.

54. On the third day of the hearing, after the claimant had finished giving her evidence, the respondent sought to introduce further documents by way of a redacted "supplemental bundle". These were not new documents, which had not been in the respondent's possession or control prior to that date. Some of the documents were already in the hearing bundle. No adequate explanation was provided for that later disclosure. The Tribunal refused to admit these documents in evidence.

55. On the fourth day of the hearing, after the respondent's witnesses had finished giving their evidence, the respondent tried again to introduce the same "supplemental bundle" in whole or in part, and to recall Mr Sparkes to

be re-examined by reference to those documents. That was refused by the Tribunal.

Analysis and Conclusions

Did the respondent act abusively, disruptively or otherwise unreasonably?

56. I find that the way in which the respondent has conducted the proceedings with respect to disclosure was unreasonable. As the above facts clearly show, not only it has failed to comply with the disclosure order by sending to the claimant all relevant documents by the deadline set by the Tribunal, but it has never properly attended to and met its disclosure obligations throughout the proceedings.

57. Even given allowance for Ms Sodhi's unfortunate car accident, she was back at work on 1 February 2024. There is no proper explanation or justification for the continuing failure to provide proper disclosure after 1 February 2024.

58. The respondent's last ditch attempt to postpone the hearing, unjustifiably blaming the claimant for the delay, its wholly inappropriate attempt to introduce further documents by way an exhibit to Mr Sparkes' witness statement, its repeated attempts to introduce a substantial number of additional documents during the hearing by way of a "supplemental bundle", - all that goes to show that the respondent's handling of disclosure was at best chaotic and at worst incompetent. In any event, it was unreasonable for the respondent to conduct that part of the proceedings in that way.

59. The respondent's representatives' lack of engagement and proper cooperation with the claimant's solicitors in preparing the case for the final hearing, despite the claimant's solicitors' repeated attempts to make them to engage and cooperate, makes the respondent's unreasonable conduct even more egregious and unjustifiable.

60. Whether the blame lies with the respondent, or its legal representatives is irrelevant for the determination of the Application. It is a matter between the respondent and its representatives. It will not be just and equitable to refuse the Application simply on the basis that the respondent was let down by its representatives. It was the respondent who chose them.

Did the respondent's response (or part of it) have no reasonable prospect of success?

61. I find that the respondent's response to the claimant's complaint of victimisation with respect to the suspension and imposition of the "12-month

warning[1]" had no reasonable prospect of success, and the respondent knew that all along, or at any rate it should have been obvious to the respondent with the benefit of legal advice it had.

62. I say that because Mr Sparkes' in his evidence admitted that having received the claimant's grievance (which the respondent did not disputed amounted to a protected act under s.27 Equality Act 2010), which he called "*not a nice email*" he contacted Croner and on their advice suspended the claimant.

63. Therefore, on his own evidence it was the claimant's grievance that was the operative cause of his decision to suspend her. Furthermore, in his witness statement, albeit denying that he suspended the claimant because of her grievance, Mr Sparkes does not say that he suspended the claimant because of any disciplinary issues, which were only put to the claimant much later, after Croner had done its so-called investigation (which started some 3 months after the claimant had submitted her grievance). On the contrary, Mr Sparkes says in his witness statement that he suspended the claimant pending Croner's investigation into the claimant's grievance.

64. Furthermore, as the Tribunal said in announcing the Judgment:

"The most damning evidence against R is the unquestionable fact that all 13 misconduct allegations against C, that were finally formulated by R in the letter of 7 March 2023, came out of the Croner's interviews with R's staff members during their investigation of the C's grievance and appeal. Even the language used in the misconduct allegations set out in the 7 March letter and what various staff said at those interviews is the same or very similar. Therefore, they could not have been misconduct allegations known to R before the C's suspension, and C could not have been suspended to investigate those misconduct allegations."

65. Equally, the respondent's defence of the victimisation complaint with respect to the 12-month warning, had no reasonable prospect of success and that was or at any rate should have been obvious to the respondent from the outset.

66. The Tribunal's findings and conclusions on this issue were as follows:

"158. We also find that that the reason C was disciplined with a written warning to remain on her file for 12 months was her protected act.

159. As I have explained earlier, it is our finding that it was the C's grievance what influenced Mr Sparkes' decision to suspend C and then to try and find a way to get rid of her. Only 4 days after the suspension, on 18 November, and without any investigation conducted, C is offered to leave under a settlement agreement. That by itself shows R's intent to get rid of C. No such offers had been made to C prior to her raising her grievance.

160. When that attempt failed, R had to find another way of seeing C off, hence the trumped up 13 charges of disciplinary misconduct (11 of which failed and failed in the most spectacular way), the rushed disciplinary process, with C given 24 hours' notice to attend a disciplinary hearing, without being given any reasonable opportunity to prepare for it (especially bearing in mind that on 7 March it was the first time C was presented with misconduct allegations against her).

[1] It was a written warning to remain on the claimant's personnel file for 12 months. "12-month warning" is used as a shorthand.

161. It seems this plan has failed when Croner's manager conducting the disciplinary hearing (in stark contrast to his colleagues involved in the claimant's grievance and the disciplinary investigation) has shown a true independence of mind and acted with impartiality and integrity.

162. As a result of that, his recommendation was to dismiss most of the alleged misconduct offenses and uphold just two related to the way C spoke with Mr Zadeh. His recommendation was to impose a sanction of written warning to be kept on her personnel file for 6 months (the maximum period allowed under the R's disciplinary policy).

163. However, Mr Sparkes decided to impose a different sanction – a written warning to be kept on file for 12 months, despite it is being clearly pointed out to him by C that it was in excess of what the R's disciplinary policy allowed.

164. Mr Sparkes' explanation for that decision is highly unsatisfactory. First, he said it was a typo, then he said that Croner told him that he could keep the warning for 12 months. However, it was his decision to do so. Why did he do that? He has not provided a clear and cogent explanation for that.

165. As I have mentioned before, the burden of proof provisions under s.136 EqA require R, when the burden of proof shifts onto it (which we find has shifted with respect to this allegation), to show that C's protected act played no part whatsoever in the decision to impose that sanction. We find that R has failed to discharge that burden.

166. Accordingly, we find that R did victimise C by suspending her, disciplining her with a sanction of written warning to be kept on the file for 12 months."

67. The claimant's solicitors sought to clarify the respondent's case on these issues, as early as 25 January 2024, when they wrote to the respondent's representatives, pointing out the deficiencies in the amended response and referring them to the comments made by EJ Emery at the preliminary hearing on 6 November 2023 that the respondent had failed to deal with these issues in its response.

68. Despite the claimant's solicitors continuing to chase the respondent to provide proper particulars of its defence to these allegations, the respondent refused to engaged with this issue, simply stating that their amended response was adequate, despite it was clearly not being so.

69. Therefore, not only the respondent's defence of these two allegations had no reasonable prospect of success, but the respondent's conduct in pursuing it without properly particularising its defence and engaging with the claimant's request for the same was, in my judgment, unreasonable conduct of the proceedings.

Has the respondent been in breach of a Tribunal order?

70. What I have said above with respect to the respondent's unreasonable conduct of the disclosure, equally applies to this alternative ground. The respondent was in persisted breach of the Tribunal's disclosure order, which it never remedied, and which beach had a serious knock-one effect on subsequent deadlines and on the preparation of the claim for the final hearing.

71. As the respondent's new representatives admitted in their late postponement application, there was "*a failure to attend adequately to the preparation of this case*".

Conclusion

72. I find, therefore, that Rules 76(1)(a) and (b) and 76(2) are engaged.

Should a costs order be made?

73. The next question I need to answer is whether in the circumstances it is just and proper for me to exercise my discretion and make a costs order against the respondent.

74. In doing so, I must consider nature, gravity and effect of the respondent's conduct and all other circumstances of the case.

75. What I have said earlier about the respondent's conduct and its defence with respect of the victimisation complaint, equally shows that the nature, gravity and effect of the respondent's defaults and failings are such that in my judgment it will be just and proper for me to exercise my discretion and make a costs award against the respondent.

76. Furthermore, the respondent was given a costs warning as early as 21 March 2024, which was repeated at least three more times. It had ample time to remedy the situation and put things back on track. It failed to do so.

How much should the respondent be ordered to pay?

77. I do not accept that the claimant's counsel costs can properly be linked to the respondent's unreasonable conduct, or part of its defence of the victimisation complaint that had no reasonable prospect of success.

78. The first counsel's fee note was in relation to the claimant's preparing further and better particulars, as she was ordered to do by EJ Emery. The second counsel's fees were for the final hearing. The hearing was concluded within the allocated time window. I do not consider that absent the respondent's unreasonable conduct/breach of the Tribunal orders, or it not pursuing its defence of victimisation complaint that had no reasonable prospect of success, the hearing would have required less time.

79. For the same reasons, I do not take into account any of the respondent's ill thought through applications made during the hearing, or its conduct after the hearing.

80. However, I do find that had:
    a. the respondent not conducted the proceedings in an unreasonable way, as I have found it had,
    b. complied with the Tribunal's orders and its disclosure obligations, and

c. properly engaged with the case, and cooperated with the claimant, as it was obliged to do pursuant to Rule 2 of the Employment Tribunals Rules of Procedure 2013,

the claimant would not have incurred additional legal costs in having her solicitors constantly chasing the respondent and dealing with the respondent's lastminute application to postpone the hearing and its late and unsatisfactory disclosures.

81. I also find that had the respondent not pursued its defence of the victimisation complaint with respect to the suspension and the 12-month warning, which had no reasonable prospect of success, the claimant would not have incurred additional costs in preparing and presenting her evidential case on this part of her claim.

82. The respondent did not provide any representation as to its ability to pay. Considering the respondent's evidence at the final hearing as to the level of commission it pays to its sales staff, I see no reasons to believe that the respondent would not be able to meet a costs order of up to £20,000.

83. Having reviewed the claimant's costs schedule, on a summary basis, I find that it would be just and equitable to order that the respondent pays a quarter of the claimant's solicitors fees, being £20,769 + 20% VAT / 4 = **£6,230.70**.

Employment Judge Klimov

8 December 2024

Sent to the parties on:
12 December 2024
....

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For the Tribunals Office